

D2

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

denying data access
prevent clearly unwarranted
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-01-197-56243 Office: California Service Center

Date: MAR 25 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the AAO on appeal. The appeal will be sustained.

The petitioner is a nursing registry with 157 employees and a gross annual income of \$2,700,000. It seeks to employ the beneficiary as an exercise physiologist for a period of three years. The director determined the petitioner had not established that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the beneficiary does not hold an unrestricted State license to practice as a physical therapist. On appeal, counsel states, in part, as follows:

. . . [T]he only issue for contention is whether a temporary license to practice physical therapy under the supervision of a licensed physical therapist is sufficient to satisfy the standard set forth in 8 CFR 214.2(h)(4)(iii)(C). We contend that it is.

. . .

In this case, Article 3 Section 2640 of the California Laws and Regulations specifically permits the beneficiary to fulfill the duties of a physical therapist albeit under the supervision of a licensed physical therapist.

. . . .
In the instant case, the Service should have approved the petition for a period not to exceed 90 days or a period in which the beneficiary can have sufficient time to take the examination and receive the results.

In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

He or she will be called upon to treat and rehabilitate patient's [sic] with musculoskeletal problems, sport-related injuries and train debilitated individuals to become independent on daily activities. He or she will be part of a Medical Team focused on Rehabilitation Medicine. Other conditions include treatment and assessment of individuals with traumatic brain injury, spinal cord injuries and cerebrovascular accident (CVA) or stroke. Training individuals that don orthotic or prosthetic devices to use them correctly. The Physical Therapist will work immediately under the supervision of a Physician.

Article 3 of Section 2640 of the California Laws and Regulations states, in part, as follows:

(b) Every graduate of an approved physical therapist education program who has filed a complete application for licensure with the board for the first time may, following receipt of a letter of authorization to take the licensing examination and perform as a "physical therapist license applicant," perform as a physical therapist under the direct and immediate supervision of a physical therapist licensed in this state, for 90 days pending the results of the first licensing examination administered. During this period, the applicant shall identify himself or herself only as a "physical therapist license applicant." If the applicant passes the examination, the physical therapist applicant status shall remain in effect until a regular renewable license is issued, or licensure is denied, by the Board.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(B):

If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The proffered position is that of a physical therapist. The beneficiary holds a bachelor of science degree in physical therapy conferred by an institution in the Philippines. A credentials evaluation service found the beneficiary's foreign education equivalent to a bachelor of science degree in physical therapy awarded by a regionally accredited college in the United States. A review of the Department of Labor's *Occupational Outlook Handbook*, 2002-2003 edition, at page 259, finds that all states require physical therapists to pass a licensure exam after graduating from an accredited physical therapist educational program before they can practice. In this case, the record contains an Authorization to Test (ATT) issued to the beneficiary by the Federation of State Boards of Physical Therapy (FSBPT) to take the following examination: California Laws & Regulations. The record reflects that the beneficiary is the recipient of an ATT, and, therefore, pursuant to Article 3 of Section 2640 of the California Laws and Regulations, *supra*, the beneficiary, under supervision, is authorized to fully perform the duties of the proffered position. In view of the foregoing, it is concluded that the petitioner has demonstrated that the proffered position is a specialty occupation within the meaning of regulations, and that the beneficiary is qualified to perform the duties of the offered job.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.